IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 20, 2007

CHARLES D. MILLS v. CSX TRANSPORTATION, INC.

Appeal from the Circuit Court for Monroe County
No. V04202P Lawrence H. Puckett, Judge

No. E2006-01933-COA-R3-CV - FILED AUGUST 8, 2007

Charles D. Mills ("Plaintiff") filed this negligence action pursuant to the Federal Employers Liability Act against his employer, CSX Transportation, Inc. ("Defendant"), after Plaintiff fell down some concrete steps while attending a safety certification meeting held at a hotel. Defendant filed a motion for summary judgment essentially claiming that Plaintiff would be unable to prove at trial that Defendant was negligent or that he was in the scope of his employment at the time of the accident. The Trial Court granted Defendant's motion for summary judgment. Because Defendant failed to affirmatively negate an essential element of Plaintiff's claim or to conclusively establish an affirmative defense, Plaintiff's burden to establish the existence of a genuine issue of material fact never was triggered. The judgment of the Trial Court is, therefore, vacated.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Harry B. Bailey, III, Atlanta, Georgia, and Michael A. Anderson, Chattanooga, Tennessee, for the Appellant, Charles D. Mills.

John W. Baker, Jr., and Emily H. Thompson, Knoxville, Tennessee, for the Appellee, CSX Transportation, Inc.

OPINION

Background

Plaintiff was employed as a "signal maintainer" for Defendant. On February 4, 2003, Plaintiff attended a safety certification meeting held at a Quality Inn in Cartersville, Georgia. According to Plaintiff:

> Upon his arrival at the motel, he was requested by Defendant's employee Mr. Pitts to park his company truck in the back of the motel. While on break from the meetings, Plaintiff was going back down to his truck which necessitated that he descend stairs to the parking lot. As he was doing so, Plaintiff tripped on a stair and fell down the remaining stairs, severely injuring his face, right shoulder, neck and teeth.…
>
> On or about February 4, 2003, Defendant negligently failed to provide Plaintiff a reasonably safe place to work, a violation of the Federal Employers' Liability Act, [45 U.S.C. § 51 *et seq*.,] by failing to inspect the premises where it ordered Plaintiff to attend a safety certification meeting; by failing to warn Plaintiff of defects in stairs at the premises where it ordered Plaintiff to attend a safety certification meeting; by failing to take proper steps to remedy the defects in the stairs at the premises where it ordered Plaintiff to attend a safety certification meeting; and by failing to properly supervise Plaintiff.…
>
> Defendant knew, or in the exercise of reasonable care should have known, that its negligence posed an unreasonable risk of injury to Plaintiff and other employees, and such negligence did, in fact, cause or contribute, in whole or in part, to the injuries made the basis of this suit.

Defendant answered the complaint and admitted that Plaintiff did attend the safety certification meeting at the Quality Inn in Cartersville, Georgia. Defendant denied any liability to Plaintiff and asserted, among other things, that any injuries Plaintiff received were the direct result of his own carelessness and negligence. Defendant also claimed that, to the extent any entity other than Plaintiff was liable for Plaintiff's injuries, it was the Quality Inn that was responsible.

Defendant filed a motion for summary judgment relying almost exclusively on Plaintiff's deposition and statements given by Plaintiff. No affidavit of any representative of Defendant was filed. Plaintiff acknowledged in his deposition that he tripped on the stairs while going to his vehicle to retrieve his blood pressure medication. Plaintiff stated he "started to go down

the stairs and I had my hand on the banister, that bar, and then all of a sudden I tripped and I … fell straight forward and hit my head on the concrete there."

Two days after the accident, Plaintiff gave the following statement:

> [I started] down the staircase. I went down the one set of staircases and I remember holding and kind of, you know how you kind of balance your hand on the railing? I was like that. I always take the where (sic) my right hand is on that railing. I try to, every time I go down the staircase that's what I do. I've got a habit of it and I've had it for a long time. And, I started down the second one and I got there in about three or four steps, I was about three or four steps up from the bottom and I don't know what it was but it seemed like my foot tripped or something, on that on them stairs, steps there and I just went head first down that them concrete. And, I tried to grab myself and there wasn't no use. It was just like I was bundled up. And, I, the next thing I knew I hit the, the concrete.… I just said to myself, I said you fool you. I said what did you do now? And I couldn't believe I had done, done it, you know.…

Plaintiff gave another statement on February 19, 2003. In this statement, Plaintiff claimed his left foot went out from under him and "it seemed like … I more or less tripped on something that was on the stairs or slid on them or something.…"

When asked if there was something Defendant did which caused or contributed to his injuries, Plaintiff stated he could not "say that" and he did not "know for sure." At the time of the accident, it was daylight, the weather was clear and dry, the stairs were adequately lit, and there was no ice on the stairs. Plaintiff further testified as follows:

> Q. The fact is, the truth of the matter is, you don't know for certain exactly what caused you to trip.… Isn't that true?
>
> A. No.
>
> Q. No, it's not true?
>
> A. That's not true.
>
> Q. Okay. What do you now say caused you to trip?
>
> A. Those steps.
>
> Q. What about those steps?

A. Well those steps. I didn't go - I didn't trip myself just to have - to fall.

Q. Is it fair to say that you are assuming that there was something about the steps that caused you to trip.…

A. There was some kind of - something on those steps that made me trip.

Q. But you don't know what it was?

A. No, after I hit the ground, I didn't know nothing much. I knew that I was in pain.

Q. So you're assuming that there had to be something, otherwise you would not have fallen?

A. Yes, sir, that's right.

In Response to the motion for summary judgment, Plaintiff filed the affidavit of a coworker, Chris Miller ("Miller"). Miller's affidavit provides, in relevant part, as follows:

> I attended the safety meeting at the Quality Inn in Cartersville … and am familiar with the stairs down which Mr. Mills fell when he sustained his injury. Each stair has an iron face and concrete tread. On that particular staircase the tread has sunk slightly below the level of the face, creating a lip where the tread meets the face. This is a trip hazard.…
>
> Shortly after Mr. Mills tripped and fell, I was descending those same stairs and, the toe of my boot caught the lip of the stair and fell forward. Fortunately, I was caught by a coworker and did not sustain injury.…
>
> Prior to the meeting at which Mr. Mills fell, we were asked by CSX supervisors to move our vehicles from the front of the hotel to the rear of the hotel, making it convenient and natural to use the stairwell where Mr. Mills fell and I almost fell.…
>
> The safety meetings we attend are mandatory. We are required by supervision to be there and are paid while we are there. Safety and conduct ruled apply. We are under the supervision of CSX management.

The Trial Court granted Defendant's motion for summary judgment. In the memorandum opinion issued from the bench, the Trial Court stated:

> We don't know whether it was the rock [that caused you to slip], we don't know whether it was a lip [on the stair]. If it was a lip it was not a slip, it was a trip.
>
> There is just too many different possible things a jury could come up with that would have to be based on nothing more than speculation under the plaintiff's own version of what happened or own versions of what happened.
>
> You just can't keep telling it until you get the jury to buy it and tell it a different way. I mean I think that's where you're going to be in front of a jury in this case without them having, at some point, to just pull it out of thin air and fabricate it from nothing.
>
> So you have got a problem here. You have got too many possible ways he could have fallen and none of them which really causally can be … connected to the actual fall.…
>
> Well, I don't think he knows how he fell. I don't think a jury will have enough evidence to know how he fell. It would be, just be sheer fiction. And I'm going to grant the motion for summary judgment.

Plaintiff appeals generally claiming that the Trial Court erred in granting Defendant's motion for summary judgment. The issues presented for review as stated by Defendant are[1]:

> I. Whether the trial court properly granted summary judgment to … [Defendant when Plaintiff] presented no probative evidence of foreseeability and causation but rather presented only speculative and conflicting theories on how and where his stumble on a flight of stairs occurred.
>
> II. Whether the trial court correctly granted summary judgment as the Employee failed to carry his burden of proof to show negligence against [Defendant]….
>
> III. Whether the trial court correctly granted summary judgment when the Employee failed to present any evidence whatsoever that

[1] We use Defendant's issues because they are more specific than the one catch-all issue raised by Plaintiff.

there was a foreseeable defect in the staircase and that [Defendant] failed to provide a safe work environment by reasonably inspecting the premises of the … hotel.

IV. Whether the trial court correctly granted summary judgment when the Employee was not acting within the course and scope of his employment when his fall occurred on a staircase exterior ro the premises while he was retrieving blood pressure medication.

Discussion

The issues on this appeal can be resolved by close analysis of a recent opinion filed by this Court in *Hannan v. Alltel Publishing Co.*, No. E2006-01353-COA-R3-CV, 2007 WL 208430 (Tenn. Ct. App. E.S. Jan. 26, 2007), *perm app. granted June 18, 2007*. We quote heavily from *Hannan*:

> The plaintiffs, Michael Hannan and his wife, Elizabeth Hannan, advertised their businesses through the local telephone directory. In 2003, the plaintiffs purchased from Alltel Publishing Co. ("Alltel") advertising space in the new directory. However, Alltel failed to include the plaintiffs' advertisement in the new directory. This prompted the plaintiffs to file suit against Alltel. Alltel filed a motion for summary judgment claiming the plaintiffs were unable to prove that they had incurred any damages as a result of Alltel's failure to include the ad in the directory. Alltel relied, in part, on tax return information showing an increase in the plaintiffs' gross income during the year the ad was missing from the directory. The trial court determined that the plaintiffs would be unable to prove that they incurred any damages. Consequently, the court granted Alltel's motion.…
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> * * *
>
> In ***Blair v. West Town Mall***, 130 S.W.3d 761 (Tenn. 2004), the Supreme Court reiterated the standards applicable when appellate courts are reviewing a motion for summary judgment:
>
> > The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tennessee Rule of Civil Procedure 56

have been met. *See Staples v. CBL & Assoc., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Cowden v. Sovran Bank/Central South*, 816 S.W.2d 741, 744 (Tenn. 1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: 1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, and 2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *Staples*, 15 S.W.3d at 88.

* * *

> When the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact.
>
> To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. If the moving party successfully negates a claimed basis for the action, the non-moving party may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim.

Blair, 130 S.W.3d at 763-64, 767 (quoting ***Staples***, 15 S.W.3d at 88-89) (citations omitted)).…

A defendant's contention that a plaintiff will be unable to prove an essential element of its claim is not sufficient to support a grant of summary judgment under Tenn. R. Civ. P. 56.

* * *

In ***Blair v. West Town Mall***, 130 S.W.3d 761 (Tenn. 2004), the plaintiff filed suit after she slipped and fell on slick oil spots as she exited the mall. ***Id***. at 762. The defendant filed a motion for summary judgment relying on the plaintiff's testimony that she did not notice the slippery substance and she did not know how long the substance had been there, where it came from, or whether anyone at the mall knew it was there. ***Id***. at 763. The trial court granted the defendant's motion for summary judgment on the basis that the plaintiff could not prove the defendant had actual or constructive notice of the slippery substance. This Court reversed after concluding that the defendant had failed to negate an essential element of the plaintiff's claim. ***Id***. The Supreme Court agreed that summary judgment was not appropriate. The High Court stated as follows:

> In support of Defendant's motion for summary judgment, Defendant offered Plaintiff's deposition testimony that Plaintiff does not know how long the substance had been present on the parking lot or whether Defendant had notice of its presence. The Court of Appeals was correct in noting that while this evidence casts doubt on Plaintiff's ability to prove at trial whether Defendant had actual or constructive notice of the dangerous condition in Defendant's parking lot, it does not negate the element of notice. The deposition testimony does not prove that Defendant did not have actual or constructive notice. Therefore, the materials filed by Defendant did not affirmatively negate an essential element of Plaintiff's claim, and Plaintiff's burden to produce evidence establishing the existence of a genuine issue for trial was not triggered. Therefore, the trial court erred in granting summary judgment.

Blair, 130 S.W.3d at 768.

As can be seen, the Supreme Court continues to adhere to the principle that a defendant seeking summary judgment must actually negate an essential element of the plaintiff's claim or establish an affirmative defense before the plaintiff's burden to produce evidence establishing the existence of a genuine issue of material fact is triggered. An assertion that a plaintiff cannot prove an essential element of her claim does not constitute the negating of that element. Hence, it is insufficient to support a grant of summary judgment. *See,*

> *e.g.,* ***Lawson v. Edgewater Hotels, Inc.***, 167 S.W.3d 816, 823-24 (Tenn. Ct. App. 2004); ***Hankins v. Chevco, Inc.***, 90 S.W.3d 254, 261 (Tenn. Ct. App. 2002).
>
> Returning to the present case, we conclude that Alltel has failed to negate an essential element of the plaintiff's claim, *i.e.*, that the plaintiffs were damaged as a proximate result of Alltel's failure to publish their advertisement. The plaintiffs alleged that they had been damaged as a result of Alltel's failure. The negative of this allegation is that they had not been damaged. Neither plaintiff testified that they had not been damaged. It is true that the plaintiffs both were unable to personally testify as to the extent of their damages; but this is not the same as saying they had not been damaged. Unless and until Alltel is able to satisfy its burden on summary judgment - to show the plaintiffs had not been damaged - the plaintiffs have the right to attempt to prove their case at trial.
>
> * * *
>
> Alltel's motion for summary judgment does not prove that the plaintiffs did not incur any damages. Rather, the motion is simply Alltel's claim that the plaintiffs will be unable to prove at trial that they incurred damages. However, the issue before this Court "is not the sufficiency of evidence at trial." ***Edgewater Hotels***, 167 S.W.3d at 824 (emphasis in original). We are dealing with summary judgment, not a trial. ***Id***. On summary judgment, Alltel has the burden of negating an essential element of the plaintiffs' claim. Until Alltel meets that burden, which it has not done, the plaintiffs are not required to file anything; the motion fails as a result of its own deficiency.

Alltel, 2007 WL 208430, at **1, 3 - 6.

Defendant's motion for summary judgment in the present case fails for the same reasons that the motion for summary judgment failed in *Hannan*. Defendant filed neither an affidavit from any of its representatives nor anything else establishing that the accident was not foreseeable, that Defendant was not negligent, that Defendant did not fail to provide a safe workplace, or that Plaintiff was not in the course of his employment when the accident occurred. Instead, Defendant's motion is based solely upon its claim that Plaintiff *will be unable to prove at trial*: (1) that the accident was foreseeable; (2) that Defendant was negligent; (3) that Defendant failed to provide a safe workplace; or (4) that Plaintiff was in the course of his employment when the accident occurred. As we stated in *Hannan*:

> A defendant's contention that a plaintiff will be unable to prove an essential element of its claim is not sufficient to support a grant of summary judgment under Tenn. R. Civ. P. 56.…

Hannan, 2007 WL 208430, at * 4.

Because Defendant failed to affirmatively negate an essential element of Plaintiff's claim or to conclusively establish an affirmative defense, Plaintiff's burden at this summary judgment stage to establish the existence of a genuine issue of material fact never was triggered. *See Blair*, 130 S.W.3d at 767. While Plaintiff may well not be able to meet his burden at trial, his burden at this summary judgment stage is far different. Therefore, the Trial Court erred when it granted Defendant's motion for summary judgment.[2]

Finally, we note that there is a disagreement between the Eastern Section and the Middle Section of this Court regarding the proper standard for evaluating a motion for summary judgment. This disagreement was examined in detail in *Hannan*, 2007 WL 208430, at *7, 8. In short, the two sections are in disagreement over whether it is sufficient, for summary judgment purposes, to claim that a plaintiff will be unable to prove his or her case at trial. We continue to adhere to our decision in *Hannan* that such proof is insufficient under the standard set by *Blair*, and we will continue to do so until instructed otherwise by the Tennessee Supreme Court. We note, however, that our Supreme Court has granted permission to appeal in the *Hannan* case, and, hopefully, this disagreement will be resolved in the near future.

Conclusion

The judgment of the Trial Court is vacated and this case is remanded to the Trial Court for further proceedings consistent with this Opinion and for collection of the costs below. Costs on appeal are taxed to the Appellee, CSX Transportation, Inc.

_____
D. MICHAEL SWINEY, JUDGE

[2] While this appeal was pending, Defendant filed a motion asking this Court to strike from the record on appeal certain portions of Plaintiff's deposition that were filed with the record, but were not considered by the Trial Court when granting the motion for summary judgment. The motion was unopposed, and it is hereby GRANTED.